BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
	)	

COMMENTS OF LORAL SPACE & COMMUNICATIONS LTD.
IN SUPPORT OF PETITIONS FOR CLARIFICATION AND RECONSIDERATION

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Loral Space & Communications Ltd. ("Loral"), by its attorneys, submits these comments in support of certain petitions filed in the above-captioned proceeding seeking clarification and/or reconsideration of the Order with regard to application of the rules to satellite operators.[1] Loral supports those petitions explaining the potentially overbroad reach of the Order as applied to satellite operations, and urges the Commission to clarify or reconsider its Order to this extent.[2]

I. INTRODUCTION AND SUMMARY.

The Order appropriately recognizes that Section 254 distinguishes between two distinct classes of service providers -- "mandatory contributors," i.e., telecommunications service providers, otherwise known as common carriers, and "permissive

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[1] Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, FCC 97-157 (released May 8, 1997) ("Order"). The Commission's Public Notice of Petitions for Reconsideration in this proceeding was published in the Federal Register on August 1, 1997. See 62 Fed. Reg. 41386 (1997).

[2] Specifically, Loral supports the Petition for Clarification or Reconsideration by GE American Communications, Inc. ("GE"), and the Petition for Reconsideration and/or Clarification by Columbia Communications Corporation ("Columbia Communications"), both filed on July 17, 1997.

contributors", that is, "other providers of interstate telecommunications [which] may be required to contribute . . . if the public interest so requires." Contrary to the recommendation of the Universal Service Joint Board, the Order exercises this permissive grant of authority to expand the universe of contributors to include "private service providers that offer interstate telecommunications to others for a fee.... "[3]

In its Petition, GE requests clarification that neither the class of "mandatory contributors" nor the class of "other providers of telecommunications" includes the provision of bare transponder space segment facilities. Columbia Communications also explains that satellite operations may frequently involve either purely private telecommunications network operations or private carriage, and that neither should be brought within the framework established by the Order. Loral supports these petitions. The special issues which arise in trying to apply concepts developed in the context of switched telephony to the largely unregulated context of satellites require further examination and amplification by the Commission.

The Commission needs to recognize that in the case of satellite-based services, it is not necessarily the satellite operator that is providing -- or even engaged in-- "telecommunications." Where space segment and uplink facilities are commonly controlled by an entity other than the satellite operator (e.g., the uplink facility operator has also contracted

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[3] Order at ¶ 795. The Order also includes payphone aggregators.

to control the space segment -- whether through purchase or long term lease), it is the uplink licensee's operation of both segments that constitutes "telecommunications." Its dominion over and operation of the transponder(s) should be formally recognized by the Commission.[4] This approach more accurately reflects satellite operations and would more readily levy only those satellite-related revenues that the Order asserts are properly subject to universal service contribution obligations.

In the alternative, Loral urges the Commission to return to the far more administratively simple recommendations that it has before it, that is, that only providers of telecommunications service, i.e., common carriers, should be required to contribute to the fund. This approach should be considered either in the specific case of satellite activity, as Columbia Communications has advocated, or more broadly across the telecommunications industry, as the Recommended Decision of the Joint Board articulated.

II. THE PUBLIC INTEREST CANNOT BE CONSTRUED TO REQUIRE THE INCLUSION OF NON-COMMON CARRIER SATELLITE REVENUES SUBJECT TO UNIVERSAL SERVICE CONTRIBUTION OBLIGATIONS.

Section 254(d) states that telecommunications carriers providing interstate telecommunications services are required to

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[4] As explained, infra, where space segment and earth segment are operated by distinct entities, either or both may be engaged in telecommunications.

In either case, the identified "telecommunications" activity must then be evaluated to determine whether it involves reportable USF revenues: where such telecommunications are provided to third parties for a fee, the resulting revenues would be subject to a Section 254 universal service levy.

contribute to universal service, while "other providers of telecommunications" may be required to contribute "if the public interest so requires." The Commission extended the obligation of universal service contributions to any form of private carriage -- that is the provision of telecommunications to a third party for a fee, but excluded purely private networks. It drew this line for two stated reasons: because private carriers rely upon the public switched telephone network (PSTN), and because the Commission perceived a need for "competitive neutrality."[5] In the first instance, the Order explained that including private providers is appropriate because these firms access the PSTN, and that without such access, they "would be unable to sell their services to others for a fee."[6] In the second instance, the Commission explained that even if the PSTN is not used, a private provider "competes with common carriers, and the principle of competitive neutrality dictates that we should secure contributions from it as well as its competitors."[7] No separate analysis was undertaken in the Order for activities of satellite operators outside of common carrier services provided by satellite.

Had such an analysis been undertaken, it would have disclosed that neither rationale applies to the case of non-common carriage satellite operations. First, satellite operations are typically devoted to large bandwidth applications,

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5 Order at ¶ 796.

6 Id.

7 Id.

most especially large data transfers and video transmissions. These occur largely outside the operation of the PSTN, rendering the Order's first rationale inapposite here.[8]

Second, the principle of competitive neutrality does not hold here for the very same reason; satellite operators are not in competition with common carriers for switched service revenues. Indeed, the competitive neutrality principle dictates in favor of *excluding* satellite operations because the Commission has chosen to exclude DBS, OVS and leased access providers. Satellite capacity is frequently used by uplink licensees to compete directly with other video distributors, such as where an FSS satellite operator provides capacity to a direct-to-home video retailer. Yet one direct consequence of the Order will be to impose monetary obligations on the FSS operator in such cases, but to exempt the revenues earned by a fully integrated DBS satellite licensee. Thus, competitive neutrality actually requires the exclusion of satellite revenues here.

It is plain, then, that the Commission cannot justify a broad inclusion of all other providers since the public interest cannot be found to "require" their participation. A different line must be drawn.

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[8] Satellite capacity may, of course, also be used for the ultimate provision of switched services; for example, Loral provides wholesale capacity to carriers, typically for redundancy purposes. This capacity then becomes part of these unaffiliated carriers' portion of the PSTN as interstate telecommunications services to end users. In these instances, the Order requires a contribution to universal service based upon end user revenues earned by the carriers.

III. ONLY CERTAIN ARRANGEMENTS INVOLVING SPACE FACILITIES SHOULD BE CONSIDERED "TELECOMMUNICATIONS."

Because a "telecommunications service" is defined to essentially capture traditional concepts of common carriage, it is fairly straightforward to determine when a satellite operator is providing common carrier services, and thus "telecommunications services" within the mandatory set of contributors. The more difficult question under the terms of the Order is when a satellite operator can fairly be said to be providing "telecommunications" to third parties and thus must contribute on this basis as well. Because the application of this term to the context of the satellite industry is a novel issue, the Commission should clarify when a satellite provider will be considered to be providing "telecommunications" for the purpose of Section 254(d).

Loral urges the Commission to find that the provision of satellite space segment facilities to an uplink operator does not constitute "telecommunications." The satellite operator continues to provide operation and control of the transponder for TT&C purposes in such cases, but that fact does not justify a finding that it is providing telecommunications. Where an uplink licensee contracts for the long term rights to provide service over the space segment, the uplink facility operator, and not the satellite operator, is plainly the entity engaged in telecommunications.

The term "telecommunications" is statutorily defined as "transmission, between or among points specified by the user, of

information of the user's choosing, without change in the form or content of the information as sent and received."[9] In order to be providing telecommunications, then, the key determinant is whether an entity is engaged in transmission services. The act of selling or leasing a piece of equipment or software merely facilitates such transmission by the purchaser or lessee. Providing only a component of transmission is insufficient to actually constitute engaging in transmission.

Absent this critical concept of engaging in transmission, any facility or any subpart thereof used in the provision of telecommunications could be captured within the definition, a result plainly not intended by Congress. This is readily apparent by contrasting the narrower scope of "telecommunications" with the far broader concept of "communication." Section 2(a) of the Communications Act grants the FCC subject matter jurisdiction over all "interstate and foreign communication by wire or radio."[10] The Act defines "communication by radio" to mean "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, *including all instrumentalities, facilities, apparatus, and services* . . . incidental to such transmission."[11] In contrast,

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9 47 U.S.C. § 153(43).

10 47 U.S.C. § 152(a).

11 47 U.S.C. § 153(33) (emphasis added). Similarly, "communication by wire" is statutorily defined to mean "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and

the definition of "telecommunications" focuses solely on the end service of transmission and does not include "all instrumentalities. . . incidental to such transmission."

For example, customer premises equipment (CPE) is plainly within the definition of wire or radio "communications," a fact that allowed the FCC to rate regulate interstate CPE at an earlier time. The provision of CPE is plainly not telecommunications, however, for otherwise the statute could be read to require CPE providers to contribute to universal service, or to reregulate CPE when offered to the public for a fee, or to preclude RBOCs from competing in that market. If manufacturers or distributors of telecommunications equipment and other activities are not to be inadvertently regulated by a misconstruction of the statute, then plainly a firm must be engaged in <u>transmission</u> -- the key word used in the definition -- to be considered to be engaged in telecommunications. This construction is buttressed further by the fact that Section 254(d) refers to "any other *provider*" of telecommunications as a possible contributor to the universal service fund -- the term provider itself connoting the ongoing provision of a service to another.

In the specific case of satellites, the question needs to be asked: who is engaged in telecommunications, who is providing the transmission? Plainly, from the FCC's spectrum management perspective, two types of mandatory licensed facilities are

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services . . . incidental to such transmission". 47 U.S.C. § 153(51).

involved: space segment, i.e., the satellite transponders, and earth segment, more specifically, the uplink earth station facility originating the transmission.[12] Telecommunications -- the transmission of bits -- is necessarily achieved by operation of both these facilities in tandem and under common control.

In today's satellite industry custom and practice, the space segment and earth segment facilities may be separately owned and controlled or may be controlled and operated in tandem. Where they are owned and operated by the same entity, such as VSAT end-to-end services, or where firms operate their own uplink facilities and have purchased (or long-term leased) transponders, those entities are engaged in telecommunications. In the former situation, the VSAT provider offering service on a common carrier basis is of course a "telecommunications service provider" and thus a mandatory contributor. In the latter situation, the transponder purchaser/uplink licensee is also plainly engaged in telecommunications, since it is controlling the transmissions. Its obligations to universal service funding will, of course, turn on whether it chooses to lease excess capacity to third parties for remuneration.

This analysis should apply regardless of whether the uplink facility owner gains access to the transponder by sale or by

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[12] The downlink stations are passive in nature and are licensed at the volition of the owner/operator to protect themselves from interference.

lease.[13] In either case, the contracting party has negotiated control over the transmitting transponder such that it is the party engaged in telecommunications. It is quite common in the satellite industry for lease arrangements to be used -- for tax, financing or marketing purposes. These lease arrangements may in fact give the lessor the same degree of control and risk that transponder sales give the buyers.

While there may be no clear distinction that would capture all long term leases, the Commission has traditionally recognized that lease terms of one year or longer constitute long term leases.[14] Alternatively, the rules should recognize that any transponder lease which endures for the life of either the license or the satellite (or transponder) itself is the equivalent of a sale. In such cases, the satellite operator has plainly relinquished dominion and control and has shifted the risk to the lessor.[15] *Thus, where the uplink facility and the associated space segment are commonly controlled by someone other*

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[13] Transponder sales are of course excluded entirely because sales do not involve the ongoing provision of a service or revenue.

[14] Prior to DISCO I, 11 FCC Rcd 2429, 2436 (1996), the test for allowing domestic common carrier satellite services to be detariffed and taken 'private' was whether the service to a customer involved a long term lease, defined as having a term of one year or longer. See also Separate Satellite Systems, 101 FCC 2d 1046 (1985), recon. 1 FCC Rcd 439 (1986) (finding that separate satellite systems could provide services through long term leases, defined as one year or more, without directly competing with Intelsat's core business).

[15] As GE's Petition correctly points out, it is no different than a facility supplier with maintenance or upgrade obligations for these purposes.

than the satellite operator, the satellite operator cannot in any way be said to be providing telecommunications.

In a typical contract of this type, it is common for the party in privity with the satellite operator to enjoy a full set of rights to the capacity on the transponder(s). Typically, such parties gain the right to exclusive use of the specified transponder(s) (although in some cases, reduced payments may be negotiated for in exchange for preemptible capacity under extraordinary conditions). As noted, these rights may extend for long terms, making the contracting party the relevant controller of the transmission for regulatory purposes.

In addition, it is the uplink licensee that controls the terminal points of any transmission. Indeed, in most cases, Loral has no way of determining how the capacity is used, and how many different terminating points may be designated. Further, the uplink licensee controls absolutely the points of origin of the transmission; indeed, the satellite operator is aware of this information only because the uplink licensee keeps the satellite operator informed on these matters pursuant to FCC rules ensuring cooperation between these two entities.[16] In sum, the USF model -- the public switched network in which the carrier controls the transmission from its origin, through the network, through hand-offs to other carriers, and ultimately to another end user which is also dependent upon its carrier provider for

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16 See 47 CFR Part 25, Subpart D.

telecommunications -- simply does not apply to satellite operations.

Where space and earth station segments are provided separately, that is, where the provision of transponder capacity is made by the satellite operator itself without having relinquished control over discrete portions of capacity to an unaffiliated entity -- an analysis should be undertaken for both the space segment and the earth segment. The relevant analysis becomes whether the telecommunications involved is being provided to a third party for a fee. In most such cases, and especially where usage sensitive pricing (as contrasted with lease or sale payments) for space segment is charged by the satellite operator, it would be fair to assume that the satellite operator is providing telecommunications to the third party uplink licensee and thus will contribute to the fund based on these revenues. A comparable analysis will be repeated for the uplink licensee's activities. This is no different than the Order's existing requirements; it reflects only a specific case application.

Analysis of the earth station uplink segment as a principal means of determining whether a universal service levy will apply to satellite-derived revenues is also consistent with the Commission's proposed approach to regulation of foreign satellite licensees seeking to provide service in the United States.[17] In

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[17] See Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, Further Notice of Proposed Rulemaking, IB Docket No. 96-11, CC Docket No. 92-23, File No. ISP-92-007, FCC 97-252 (released July 18, 1997) ("DISCO II Further Notice").

the *DISCO II Further Notice*, the Commission proposes to regulate access to foreign licensed satellite systems in the U.S. through the earth station licensing process, recognizing that it need not and should not replicate the satellite authorization processes of the ITU and of other countries.[18] Similarly, as the locus of the provision of service, control of the earth segment should be a determining factor when considering whether an entity is providing telecommunications for the purpose of the universal service fund.

Moreover, adoption of this approach will ensure that non-U.S. satellite providers contribute to universal service where such providers engage in telecommunications through non-U.S. satellite transponders accessed through U.S.-licensed earth stations. Here again, the principle of competitive neutrality would dictate comparable treatment for U.S. and non-U.S. satellite licensees competing for U.S. business.

In sum, Loral supports clarification of the Order to ensure that any and all arrangements whereby the satellite operator has relinquished to a contracting party the rights to control the transponder(s) -- that party is the one engaged in "telecommunications." A bright line can be drawn that would make plain that, like transponder sales, all long term leases (one year or more) involve the provision of telecommunications by the lessee and not the satellite operator.

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[18] The earth station application would be processed in the relevant space segment licensing round, or outside of that process if the non-U.S. satellite has been launched and ITU coordination has been completed. See id. at ¶ 48-49.

IV. IN THE ALTERNATIVE, THE COMMISSION SHOULD RETURN TO THE JOINT BOARD RECOMMENDATION TO DEFINE THE WORLD OF UNIVERSAL SERVICE CONTRIBUTORS USING THE "TRS APPROACH."

Alternatively, the Commission should return to the far simpler line drawn in the Joint Board's recommendation and refrain from exercising its permissive authority at this time.[19] The present scope of providers subject to the universal service levy under the Order is far broader than intended by the Joint Board. To avoid unintended consequences, the Commission should not require that "other providers of telecommunications" contribute at this time.

In its discussion of the identification of contributors to the Section 254 universal service fund, the Joint Board recommended that the Commission adopt the "TRS approach,"[20] which requires that "[e]very carrier providing interstate telecommunications services" contribute to the TRS fund.[21] Because "telecommunications services" are telecommunications offered on a common carrier basis,[22] the clear intent of the Joint Board was to limit the class of contributors to common carriers. Indeed, the Recommended Decision clearly states that "any entity that provides any interstate telecommunications for a fee to the public, or to such classes of eligible users as to be

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19 Federal-State Joint Board on Universal Service, Recommended Decision, CC Docket No. 96-45, FCC 96J-3, at ¶ 794 (released November 8, 1996) ("Recommended Decision").

20 Id. at ¶ 786

21 Id. at ¶ 780.

22 See Order at ¶ 785.

effectively available to a substantial portion of the public" should be required to contribute to the fund.[23] The Joint Board similarly recommended that the Commission should refrain from exercising its permissive authority to require "other providers of telecommunications" to contribute.

As the Joint Board noted, the TRS model is useful because both the industry and the Commission "are already familiar with this approach."[24] Moreover, the Joint Board found the TRS approach "easy to explain and easy to apply."[25] Under such circumstances, a very high hurdle is created before one should attempt to create a wholly new schema with additional complexities. The Commission should adopt the Joint Board's recommendation.

To the extent the Commission wishes to continue to include private providers of telecommunications as contributors, it should consider the petition of Columbia Communications to carve out satellite activities, other than satellite common carriage. As discussed in Section II, supra, the FCC's public interest rationales for extending universal service contribution obligations to private providers are wholly inapplicable to non-common carrier satellite operations. Thus, the statutory mandate that the "public interest require[]" inclusion of such activities cannot be met.

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23 See Recommended Decision at ¶ 784.

24 Id. at ¶ 786.

25 Id.

IV. CONCLUSION

For the reasons set forth above, Loral respectfully requests that the Commission clarify the Order in accordance with these comments.

Respectfully submitted,

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August 18, 1997

CERTIFICATE OF SERVICE

I, Dennette Manson, do hereby certify that on this 18th day of August, 1997, copies of the foregoing "Comments of Loral Space & Communications Ltd." were mailed, first class postage prepaid, unless otherwise indicated, to the following parties:

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